IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

ALBERT F. HOLDEN, Plaintiff in Error,
vs.
HARVY HARDY, Sheriff of Salt Lake County, Utah,
No. 655.

AND

ALBERT F. HOLDEN, Plaintiff in Error,
vs.
HARVY HARDY, Sheriff of Salt Lake County, Utah.
No. 658.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

In both of the above-entitled cases is involved the constitutionality of the same statute of Utah, the only difference being that in the first thereof (No. 655) the defendant Holden was convicted of a violation of section

one of said act, while in the latter (No. 658) he was prosecuted and convicted under the second section. We will, therefore, in this brief, consider them together, referring in the following statement to the Record in No. 656.

The statute of Utah to which reference has just been made is entitled "An act regulating the hours of employment in underground mines and in smelters and ore reduction works." (*Session Laws of Utah, 1896, p. 219.*) Sections 1, 2, and 3 thereof are as follows:

"*Sec. 1.* The period of employment of working men in all underground mines or workings shall be eight (8) hours per day, except in cases of emergency where life or property is in imminent danger.

"*Sec. 2.* The period of employment of working men in smelters and all other institutions for the reduction or refining of ores or metals shall be eight (8) hours per day, except in cases of emergency where life or property is in imminent danger.

"*Sec. 3.* Any person, body corporate, agent, manager, or employer who shall violate any of the provisions of sections 1 and 2 of this act shall be deemed guilty of a misdeameanor."

The complaint, which is set forth on page 1 of the Record, charges that, on the 6th June, 1896, the defendant Holden, contrary to the provisions of the statute above quoted, employed to work and labor as a miner in the underground workings of the Old Jordan mine, in the County of Salt Lake, one John Anderson for the period of ten hours each day, and that the said Anderson continued in said employment, whereupon the defendant was arrested, and upon being brought into court (*R., p. 2*) interposed a plea of not guilty in manner and form as charged.

For a further plea the defendant, while admitting that, at the time and place and for the work alleged, he did

employ the said Anderson for ten hours a day, said that he was not guilty because he was a native-born citizen of the United States, because the said Anderson voluntarily engaged his services for the hours per day alleged, and because the facts charged do not constitute a crime, the said statute being repugnant to the Constitution of the United States, in that it deprives the defendant and all other employers and employés of the right to make contracts in a lawful way and for lawful purposes; that it is class legislation and not equal or uniform in its provisions, and that it deprives employers and employés of the equal protection of the laws; that it abridges the privileges and immunities of the defendant as a citizen of the United States, and deprives him of his property and liberty without due process of law. (*R., pp. 2, 3.*)

Subsequently, on the 25th of June, 1896, the defendant was found guilty as charged in the complaint, and he was, thereupon, sentenced to pay a fine of $50 and costs, amounting to $7.80, and to imprisonment in the county jail for the term of fifty-seven days, or until said fine and costs be paid (*R., p. 3*); whereupon, having been committed to the custody of the sheriff, the defendant filed a petition in the Supreme Court of Utah for a writ of *habeas corpus* (*R., pp. 4, 5*) which was denied (*see opinion of court, R., pp. 9–18, inc.*), and the case was thereupon removed by writ of error to this court, where it is now pending.

ASSIGNMENT OF ERRORS.

The court below erred in holding—

1. That chapter 72 of the laws of Utah, approved March 30, 1896, under which defendant was convicted, as above set forth, is a valid enactment and not repugnant to the Constitution of the United States, and in affirming the conviction of the plaintiff in error thereunder and not holding the same unlawful.

2. That said act does not deprive the plaintiff in error of his liberty and property without due process of law.

3. That said act does not impair the obligation of lawful contracts made and entered into by the plaintiff in error, and his right to make such contracts.

4. That said act is not class legislation and is equal and uniform.

5. That it does not deprive the plaintiff of the equal protection of the laws, or abridge his privileges and immunities as a citizen of the United States.

6. And other errors appearing in the opinion of said court as set forth in the record herein.

BRIEF.

All the points enumerated in the foregoing assignment of errors were presented to the court below both in the oral arguments and in the printed briefs in the case. They amount, in substance, to the proposition that the law in question is not a legitimate exercise of the police power of the State, in that it deprives mining and smelting employés, and their employers of the right to make contracts which persons in other lines of business may make; that it, therefore, deprives them of the equal protection of the laws, and that in these respects it is class legislation.

The court below, after quoting the provision of the Constitution of Utah (*Sec. 6, Art. 16*), that "the Legislature shall pass laws to provide for the health and safety of employés in factories, smelters and mines," and stating that it assumes that the object of this provision is to protect the miner from the injurious

consequences of prolonged physical effort, etc. (*R., p. 10*), and, as such, is a valid exercise of one of the police powers of the State, in effect, says, that, although any law passed in pursuance of the constitutional provision just quoted *must* be connected with some of the objects and calculated to effect some of the purposes therein expressed, nevertheless, unless the court can see clearly that it is *not* so connected the statute will not be held void on that account. The court, therefore, refused to declare said law void because, while it does not appear from the act itself that it was enacted for the purpose just stated, still it can not be said that the limitation of the period of labor contained therein, to eight hours a day, is *not* calculated to promote and protect the health of the class of men who work in underground mines.

The court below also held that, as the legislature of Utah had the power to enact the law in question, the provision of the Fourteenth Amendment of the Federal Constitution, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," has no bearing upon the present case, it only securing to citizens of the United States, as such, the privileges and immunities enjoyed by citizens of the States of which such citizens of the United States are also citizens. The court further held that if said law was valid, and the legislature had the power to enact it, the plaintiff in error was not thereby deprived of due process of law, as the usual process was resorted to in respect of his trial, conviction, and imprisonment, and, also, that, as said law includes *all* employers and employés engaged in the business of working underground mines, etc., and as none are omitted who may be subject to the peculiar conditions attending such mining, the equal protection of the laws is not denied.

We now proceed to consider in detail the various questions to which we have called attention.

I.

The statute of Utah involved herein is in conflict with the Constitution of the United States, and is not a valid exercise of the police power of the State.

Although it is not so expressed either in the title or in the body of the act in question in this case, and although it is only in the most remote degree, if at all, inferable therefrom, the only possible justification or excuse that can be found or assigned for the enactment of such a law as that now under consideration is that it was enacted in compliance with the section of the State Constitution set forth at pages 9 and 10 of the Record as a regulation for the protection of the health and welfare of laborers engaged in underground mining, etc., and, as such, a valid exercise of that power which is inherent in all the States, commonly known as the "police power"; and this is the ground upon which the court below held it to be a valid enactment.

Therefore, before presenting our views in detail concerning the repugnance of this statute to the Constitution of the United States, and to the various clauses of the Fourteenth Amendment which we think applicable to the matter in controversy, we deem it appropriate to ask the attention of the court, at the outset of this brief, to some of the most conspicuous of the authorities bearing upon the general question as to the *scope* of this police power, and as to the subjects relating to which it may properly be invoked.

1. We have not found in any of the text books or cases an authoritative statement defining and limiting the exact scope and range of this power. In fact, this court itself, in the case of *Stone* v. *Mississippi* (101 U. S., 814), has declined to specifically define it; but in the case of

the *City of New York* v. *Miln* (11 Pet., 102, 139), will be found probably as concise and comprehensive a *general* definition of the term as could be given. The court says:

"We are aware that it is at all times difficult to define any subject with proper precision and accuracy. If this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering [the police power]. If we were to attempt it, we should say that every law came within this description which concerned the welfare of the *whole people* of a State, or any individual within it; whether it relates to their rights or their duties; whether it respected them as men or as citizens of the State; whether in their public or private relations; whether it related to the rights of persons or of property, of the whole people of a State or of any individual within it."

The court, however, is careful to add that this jurisdiction or power can only be exercised where it is not "surrendered or restrained by the Constitution of the United States."

In the case of *Lake View* v. *Rose Hill Cemetery Company* (70 Ill., 192), it is said:

"The police power of a State is co-extensive with *self protection*, and is applicably termed the law of overruling necessity. It is the inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort and welfare of *society*."

See also—

Commonwealth v. *Alger*, 7 Cush., 84;
Railroad v. *Husen*, 95 U. S., 465;
State v. *Noyes*, 47 Maine, 211;
Thorpe v. *Railroad*, 27 Vt., 149.

In the matter of *the Application of Jacobs* (98 N. Y., 107), the court discusses the police power as follows:

"But the claim is made that the legislature could not pass this act in the exercise of the police power. That

power is very broad and comprehensive, and is exercised to promote the health, comfort and safety and welfare of *society*. Its exercise in *extreme* cases is frequently justified by the maxim *salus populi suprema lex est*. It is used to regulate the use of property by enforcing the maxim *sic utere tuo ut alienum non laedas*. Under it the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other; and, in cases of great emergency engendering overruling necessity, property may be taken or destroyed without compensation, and without what is commonly called due process of law. The limit of the power can not be accurately defined, and the courts have not been able or willing definitely to circumscribe it. *But the power, however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law*, the guide for the conduct of legislators, judges, and private persons, *and, so far as it imposes restraints, the police power must be exercised in subordination thereto.* * * * In the *Slaughter House Cases* (16 Wall., 36, 87), Field, J., says: 'All sorts of restrictions and burdens are imposed under the police power, and, when these are not in conflict with any constitutional prohibition or fundamental principles, they can not be successfully assailed in a judicial tribunal. *But under the pretense of prescribing a police regulation, the State can not be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment.*'"

After also quoting certain passages from Cooley's Constitutional Limitations, 719; Potter's Dwarris on Statutes, 458; *Commonwealth* v. *Alger* (7 Cush., 84); *Austin* v. *Murray* (16 Pick., 126); *Watertown* v. *Mayo* (109 Mass., 319); *Coe* v. *Schultz* (47 Barb., 64), and *in re. Cheesebrough* (78 N. Y., 232), all to the same effect as that just quoted from the Slaughter House Cases, the court states its conclusions as follows:

"These citations are sufficient to show that the police power is not without limitations, and that in its exercise

the legislature must respect the great fundamental rights guaranteed by the Constitution. If this were otherwise, the power of the legislature would be practically without limitation. In the assumed exercise of the police power in the interests of the health, the welfare or the safety of the public, every right of the citizen might be invaded and every constitutional barrier might be swept away. * * * *Under the mere guise of police regulations personal rights and private property can not be arbitrarily invaded, and the determination of the legislature is not final or conclusive.*"

Another very full and instructive discussion of this subject will be found in the case, above cited, of *Commonwealth* v. *Alger* (7 Cush.), beginning at page 84.

To be valid, legislation enacted for the purpose of promoting the public health, morals, or welfare must be of such a character that it will affect and be for the benefit of the *whole community*, or at least the part of it which is brought into contact with the evils sought to be remedied. Such an enactment must not be so limited in its terms that it can and will, as in the present case, operate upon but one of many classes of employers and employés of the same general description, living and doing business under the same general conditions, even though the occupation in which they are engaged to themselves may be injurious. In other words, it must relate and have reference to the result to the health and welfare of the *community* of the act or omission or the condition sought to be prevented or remedied, and not to the result of such act or omission to the author or person who is responsible for such condition or engaged in the dangerous or injurious occupation—that is, provided such person is *sui juris* and does not come within the class of persons (such as women, children, etc.) over which, as has been held in some of the States, the State has the right, to a limited extent, to exercise control for their *own* good and welfare, and thus indirectly for the welfare of the public.

For instance, a regulation restricting the speed with which railroad trains or horses may be run or driven within the limits of a city is not a regulation enacted for the benefit of, or for the purpose of preventing injury to, persons who may deliberately violate the law. Such persons must of course take whatever risk may be incident to their own indiscretion or recklessness, and if they come to grief, that is a matter in which the public has no concern. Such regulations, on the contrary, are adopted for the benefit and protection of the community at large and to prevent accidents and injury to pedestrians and other persons who may be riding or driving upon the streets of the city and not violating the law.

This is, also, the principle upon which contagious hospitals are not permitted to be near enough to any habitable part of the city to spread disease among its inhabitants, and upon which the owners of a powder factory would be required to locate their plant far enough from the property of others to prevent the possibility of damage or loss of life by reason of an explosion or otherwise. But, although a powder mill is considered an extremely dangerous place in which to work, a law forbidding persons who are *sui juris* to accept employment therein would be clearly unconstitutional and void; and it is not for the protection of the health or lives of the residents of the city who may be employed in a powder mill that such factories are excluded from the city limits, but for the protection of the city itself and the property and lives of the residents who are not so employed.

It is, therefore, not within the power of the legislature to prevent persons who are *sui juris*, and otherwise perfectly competent to contract, from entering into employment and voluntarily making contracts in relation thereto merely because the employment in which they are to engage, although perfectly legal and proper in itself, may be considered by the legislature to be dan-

gerous or injurious to the health of the *employé;* and if such right to contract can not be prevented, it certainly can not be restricted by the legislature to suit its own ideas of the ability of the employé to stand the physical and mental strain incident to the work. The character of the work to be performed, the number of hours a day in which the employé shall work, and the amount of compensation to be paid therefor are purely and necessarily personal matters between the parties to the contract, and are regulated by the terms thereof and by the will of the employer, influenced by considerations as to the requirements of his business and the condition of the market for his products, etc., and it is clear, as it seems to us, that so long as the employment does not interfere with the rights or health of others, the legislature can not prevent it or regulate any of its terms.

If, for any reason, the condition of the market should become such that there was no sale or demand for the product of an iron mine, for example, and the owner, in consequence of this condition, should find that he was running his business at a loss, it would be ridiculous to say that he would not have a perfect right to lay off some of his hands altogether, or to work them all half time, or arbitrarily to reduce the number of working hours of all to any extent he might think necessary or advisable; and if he could do that, we do not see why he could not, for the purpose of meeting an increased demand for the product of his mines and the competition from other sources, or if for any reason the condition of the market warranted it, *increase* the number of hours of his workmen to ten or any other number more than eight that they might be willing to work or contract with him for.

A case here directly in point is that of *Jacobs* (98 N. Y., 98, *supra*), where the court had under consideration a law of New York prohibiting the manufacture of cigars

and the preparation of tobacco in any form in tenement houses, etc. In the opinion the court says:

"To justify this law *it would not be sufficient that the use of tobacco may be injurious to some persons, or that its manufacture may be injurious to those who are engaged in its preparation and manufacture; but it would have to be injurious to the public health.*"

2. But however this may be, it is well settled that, when relating to business enterprises, the business or occupation at which such regulations are directed must be affected with a "public interest," and that the regulation must be for the protection or benefit of the public generally, as we have above contended, and not of an individual or segregated class of individuals under the circumstances we have mentioned.

In this connection it is to be noted that the court below itself, in its opinion (*R., p. 17*) took occasion to state that it did not agree with defendant's counsel that the business of mining is affected with a public interest, and that the legislature had the power to pass the law in question for *that* reason. The language of the court is as follows:

"We do not agree with defendant's counsel that the business of mining is affected with a public interest, and the legislature had the power to pass the law for that reason. Mines are owned by private persons or corporations, who have the exclusive use and control of them, as a farmer may own his farm and have the exclusive use and control of it. The fact that the business may *benefit* the public does not give the public any interest in the mine or its business, or affect it with a public interest. It is not like the railroad business. Such property and business is owned by a private corporation, but the *use* of the road is in the public. Travelers and shippers have a common right to use the road for such purposes by paying fares or freights. The same may be said of other classes of business similarly affected with a public

use and interest. On this point the court said in the last-cited case" (*Matter of Jacobs*, 98 N. Y., 98): 'Although the legislature may declare it to be public, that does not necessarily determine its character. It must in fact be public, and if it is not no legislative fiat can make it so.'"

In Cooley's Constitutional Limitations (4th Ed., p. 476), the various kinds of business enterprises which the author considers affected with a public interest are classified as follows:

"In the following cases we should say that property in business was affected with a public interest: 1. Where the business is one the following of which is not of right, but is permitted by the State as a privilege or franchise. Under this head would be comprised the business of setting up lotteries, of giving shows, etc., of keeping billiard tables for hire, and of selling intoxicating drinks when the sale by unlicensed parties is forbidden, also the cases of toll-bridges, etc. 2. Where the State, on public grounds, renders the business special assistance, by taxation or otherwise. 3. Where, for the accomodation of the business, some special use is allowed to be made of public property or of a public easement. 4. Where exclusive privileges are granted in consideration of some special return to be made to the public. Possibly there may be other cases."

This court, in the case of *Munn* v. *Illinois* (94 U. S., 126), defines the property that is subject to police regulation as follows:

"Property does become clothed with a public interest when used in a manner to make it of *public consequence* and affect *the community at large*. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created."

In Tiedman's Limitations of Police Powers (sec. 179), the author defines the distinction between private and public employments as follows:

"When the employment is connected with a public interest, and particularly when it is connected with the enjoyment of a franchise or privilege not enjoyed by private individuals, a privilege which is granted because it will promote the general welfare, such as the railroad, the telegraph, the telephone, and the like, the public is interested in the proper conduct of the business, and any disturbance of or interference with its regular and orderly prosecution will materially affect the public interest."

This principle is also stated in Cooley's Constitutional Limitations (p. 720), in the following language:

"The maxim *sic utere tuo ut alienum non laedas* is that which lies at the foundation of the power; *and to whatever enactment affecting the management and business of private corporations it can not fairly be applied the power itself will not extend.* * * * 'Powers' it is said in another case, 'which can only be justified on this specific ground (that they are police regulations), and which would otherwise be clearly prohibited by the Constitution, *can be such only as are clearly necessary to the safety, comfort and well-being of society, or so imperatively required by the public necessity as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it.*' (*People* v. *Jackson and Michigan Plank Road Co.*, 9 Mich., 307.)"

In the case of *United States* v. *Martin* (94 U. S., 400), in which this court was called upon to construe section 3738 of the Revised Statutes, providing that eight hours shall constitute a day's work for employés of the Government, it was held that said statute was "in the nature of a direction from a principal to his agent that eight hours is deemed to be a proper length of time for a day's labor,

and that his contracts shall be based on that theory," but the court distinguishes between such a direction and the principle involved in the case at bar, as follows:

"The English statute books are full of assizes of bread and ale, commencing as early as the reign of Henry II., and regulations of labor, and many such are to be found in the statutes of the several States. It is stated by Adam Smith, as the law in his day, that in Sheffield no master cutler or weaver or hatter could have more than two apprentices at a time, and so lately as the 8th George III. an act, which remained unrepealed until 1825, was passed, prohibiting, under severe penalties, all master taylors in London, or within five miles of it, from giving, or their workmen from accepting, more than two shillings seven pence half penny a day, except in the case of general mourning." (Smith's Wealth of Nations, 125, 6th Oxford edition of 1869.) "*A different theory is now almost universally adopted. Principals, so far as the law can give the power, are entitled to employ as many workmen, and at whatever degree of skill, and at whatever price they think fit, and, except in some special cases, as of children or orphans, the hours of labor and the price to be paid are left to the determination of the parties interested.* The statute of the United States does not interfere with this principle."

We conclude our citation of authorities upon this general question of police power by again quoting from Tiedman. In section 178 of his said work there will be found as concise and comprehensive a statement of our contention in this regard as could be formulated. It is as follows:

"Laws, therefore, which are designed to regulate the terms of hiring in strictly private employments, are unconstitutional, because they operate as an interference with one's natural liberty in a case in which there is no trespass upon private right and no threatening injury to the public. *And this conclusion not only applies to laws regulating the rate of wages of private workmen, but also any other law whose object is to regulate any of the terms of hiring, such as the number of hours of labor per day, which*

the employer can demand. There can be no constitutional interference by the State in the private relation of master and servant except for the purpose of preventing frauds and trespasses."

3. From the foregoing authorities it would seem to result that an enactment of the legislature, made in pursuance of the police power of a State, or a police regulation, must be for the purpose of enforcing a duty and to punish acts or omissions which may be right or wrong according to the time, place or manner of doing them—that is, the exercise of what would otherwise be a right at a time, place, or in a manner injurious to the public, is prohibited. A general criminal law is to punish something wrong in itself, without regard to the time, place or manner of doing it, and of course such a law, whether enacted by original or delegated authority, is not a police regulation.

Therefore, the violation of the maxim *sic utere tuo ut alienum non laedas* covers every case in which the exercise of the *police power* would be valid or legitimate; and we think no case of a valid police regulation can be found which will not come under this maxim, and which does not refer to the limitation of the exercise of what, under proper circumstances, would be a right, and only becomes a wrong because of its excessive exercise or consequent injury to the health, welfare or morals of the public. Police regulations are, therefore, not enacted for the purpose of punishing wrongs, as such, but to enforce duties to the public in respect to matters which can only become wrongs *sub modo*. The right to destroy property to stay a conflagration and in case of war, etc., is also distinguishable, and is based upon the maxim *salus populi suprema lex*. So of the right of eminent domain; though exercised for a public use, it is based on compensation. In a police regulation, there is only restraint for the *public* welfare.

In a civil case, for instance, the judge would charge the jury, as matter of law, that the mine owner owed a duty to his employés to furnish them with a reasonably safe place within which to work. This duty can be enforced under the police power of the State by means of regulations providing for proper inspection, ventilation, timbering, the securing of openings, the placing of guards, lights, etc., and requiring the employer to take all other appropriate precautions to insure, as far as possible, the safety and health of the employé. In this respect the employé is regarded as part of the public to whom the employer owes the duty just stated. But the judge would also charge that the employé, by his contract, assumed all the dangers of the business that are necessarily incident to it, and of which he knew or could with reasonable care have ascertained, and in this respect the employé is a voluntary contractor with his employer to perform the services required of him, in the manner and at the time required, in consideration of the wages or compensation paid him for the work. If, with regard to the dangers and unwholesomeness of the employment, the employer were under the same liability and duty to his employés as he is to the public, no business of a dangerous character could be conducted.

In the latter case, as to the contract, and the dangers, unwholesomeness, etc., of the work he is required to perform, the employé has separated himself from the public and in respect of the things or dangers against which the public, who have entered into no contractual relations with the employer, have a right to be protected, and has assumed the duties and obligations of a servant to his master. In short, he puts himself in exactly the same situation as the owner of the property or business, who undoubtedly has the right on his own property and in his own business to work as many hours per day as he chooses, to manufacture whatever articles he may choose

to manufacture, to operate a mine, or to do anything which he may deem necessary to the conduct of his business, whether the same be unwholesome or dangerous or not, provided the health, welfare or morals of the public generally are not injuriously affected thereby.

To illustrate: A manufacturer of dynamite has no right to locate where there is danger to the public. On his own land, however, and where there is no possibility of injury to the public, he may carry on his said business, and in its conduct may employ as many men as he may consider necessary for his purposes. The men whom he employs, of course, assume all the necessary risk and dangers of the employment. So far as their contractual relations with their employer extend, they are not a part of the general public, although as to the certain well-defined duties which the master owes to them and to the public generally, some of which we have above enumerated, they are a part of the public. And this seems to explain theoretically why the courts have held certain laws enforcing such duties valid police regulations. Almost universally, as we will hereinafter show, they have held those that affect the right to make contracts void in so far as they have no relation to a mere duty of the employer to his employés.

If, therefore, the Constitution of the State requires the legislature to enact laws respecting the health of miners and others, the law to be valid must relate to the duty of the employer to his employés in the respects we have indicated, and must not interfere with the relation of the parties that rests solely on contract.

The present law has no relation to health or safety, either of the public or the persons affected, or, if so, only in a very remote degree; while its direct and principal effect is to interfere with the rights and liberties of the contracting parties.

It is apparent that if the police power extends to matters affecting contract relations and in which the public

health, etc., is in no way concerned, there is practically no limit to its exercise, and all business conducted in the States, whether of a public, *quasi* public, or strictly private nature, could be made subject to such laws regulative thereof as the legislatures of the respective States might see fit to adopt, and the personal liberty of the citizen, secured to him by the Constitution of the United States, would be entirely subverted.

(4) In this connection we desire to suggest that the constitutionality of this statute must be considered in the light of its *effect* upon the class of persons upon whom it operates, and upon the relation of the prohibition therein contained to the general public. When this is taken into consideration, it is apparent that, even if by any possibility it could fairly be said (as was assumed and said by the court below) that the enforcement of the provision contained in said measure could be conducive of the health or welfare of the employés enumerated therein, and in that respect is not unconstitutional, still it is so flagrantly violative of the rights and liberties of the citizens affected thereby—both of the employer and employé—that it is brought in direct conflict with the Constitution of the United States, if not of the constitution of Utah, and can not for that reason be allowed to stand.

In the case of *Henderson* v. *Mayor of New York* (92 U. S., 268), this court says:

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

And in the case of *Rutherford* v. *Greene* (2 Wheat., 203), it is said:

"Whatever the legislative power may be, its acts ought never to be so construed as to subvert the rights of property, unless its intention to do so shall be expressed in such terms as to admit of no doubt and to show a clear design to affect the object."

The effect of this statute has perhaps already been sufficiently shown in what we have above stated. Should it be allowed to stand, not only would all parties coming within its provisions be actually divested of certain rights and liberties possessed and enjoyed by them before the passage of the act, to-wit, the right to contract with reference to that most important and fundamental of all rights, namely, the right to labor, but such liberty and rights of property would be restricted and denied them in the future, thus placing them at a disadvantage with all other citizens of the same general class and living under the same conditions, and between whom and the class named in the act no radical or essential distinction, such as the authorities hold to be necessary, exists.

If this act had attempted to regulate the *price* to be paid for labor in mines and smelters—for instance, if it had provided that the laborer, although his hours of work should be reduced to eight, should be paid what he had formerly received for ten, there could be no question as to its unconstitutionality, and yet as by the act the period of employment is, without the consent of the laborer, limited to eight hours per day, it would be only fair to the laborer that the act should further provide that he should lose nothing pecuniarily by reason of such reduction or limitation of his earning capacity, other laborers in similar and equally dangerous and unwholesome occupations, such, for example, as engineers, bricklayers, mechanics, glass blowers, employés in manufactories of high explosives, stokers, and the like, being permitted by the act to work and be paid for as many hours per day as they please or can contract for.

Therefore, even if this act can fairly be assumed to have been a measure adopted by the legislature of Utah for the protection of the health or welfare of the class of persons affected thereby, it is, nevertheless, unconstitutional, because, when actually applied, it is found to be

in contravention of the principles, and destructive of the rights and liberties of the citizen to which we have above pointed. To repeat the language of this court in *Boyd* v. *United States* (116 U. S., 635), varying it slightly to suit the circumstances of this case, we have no doubt that the legislature, in enacting this statute, "was actuated by perfectly proper motives," but we presume that "the vast accumulation of public business brought before it prevented it, on a first presentation, from noticing objections which have become developed by time and the practicable application of the objectionable law."

II.

The statute in question abridges priviliges and immunities of the plaintiff in error to which he is entitled as a citizen of the United States.

The plaintiff in error in this case is a native-born citizen of the United States, and was at the time of his arrest, and now is, a citizen of the State of Utah, and as such was and is entitled to all the priviliges and immunities of citizens of the United States as secured to them by the Constitution.

It seems to be settled by the decisions of this court, and of many others that have had this subject under consideration, that among the privileges and immunities secured to the citizen by the Fourteenth Amendment is the right "to pursue unmolested a lawful employment in a lawful manner." (*Live Stock Association* v. *Crescent City Co.*, 1 Abb., U. S., 388, 389.) Incidental to this there is, of course, the further right to enter into contracts relating to the *character* of the services to be performed, the *amount of compensation* to be paid and received therefore, and the *period of time or the number of hours per day* required to perform such labor.

The allowance to the employer of labor, and the working man, of perfect freedom and liberty in this respect is absolutely and manifestly essential in this age of constant progress in business affairs and of great and increasing competition, to enable the employer and laborer, alike, to maintain life and to render any legitimate employment or business in which they may be engaged successful. Whatever may be the wisdom or necessity for enacting laws restrictive of the hours of labor of women, children, or orphans, or the advisability of enacting such laws with reference to the employés in the various kinds of business enterprises that are held to be affected with a public interest, it is perfectly obvious, because of their great diversity and the character and necessities of the different kinds of private business enterprises, that it would be impossible to devise a law or regulation limiting the hours of employment of such employés that would operate with any degree of equality or with anything like justice upon the employers and employés in all private business enterprises, or even those of the same general class.

In the Constitution of the State of Utah itself, this distinction is recognized, and *only the hours of work of employés of the "State, county, and municipal governments"* are attempted to be regulated thereby, the law here in question being claimed to have been authorized and passed under the additional provision that "the legislature shall pass laws to provide for the health and safety of employés in factories, smelters, and mines." The law, however, fails to make any such provision with reference to employés in factories.

As we have seen, such laws as to *public* employés are regarded by the courts merely as directions from a principal to his agent, and as such are held to be competent; but, in the case of private employment or labor, as so aptly stated by this court, "principals, so far as the law

can give the power, are entitled to employ as many men, and of whatever degree of skill, and at whatever price, they think fit, and except in some special cases, as of children and orphans, *the hours of labor* and the price to be paid are left to the determination of the parties interested." (*United States* v. *Martin*, 94 U. S., 400, *supra.*)

Applying the principle last stated to the present case, it can not be said that an act making it a misdemeanor for a private and independent mine operator to employ his workman more than eight hours a day, except in cases of emergency where life or property is in imminent danger, and subjecting him to a fine and imprisonment in consequence of a violation of such provision, does not infringe or abridge the right of both the employer and laborer, to make contracts which persons and corporations in other lines of business may make, and that it does not thus abridge the privileges and immunities so secured to them as citizens of the United States.

We now turn to some of the authorities supporting our present contention, from which it will be seen that, while the courts do not attempt specifically and in detail to enumerate and define all of these privileges and immunities, they are practically unanimous in holding that the right to pursue, in a lawful manner, a lawful vocation or trade, unmolested by laws in any way restrictive of that right, is a privilege that is protected and secured to the citizen by the Constitution of the United States.

The first of the decisions of this court in which we find a definition of the term "privileges and immunities" is that of *Ward* v. *Maryland* (12 Wall., 430), where it is said:

"Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the

court. Beyond doubt, these words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the rights of the citizens of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation, to acquire personal property, to take and hold real estate, to maintain actions in courts of the State, and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens."

We take the following from the dissenting opinion of Justice Field in the *Slaughter House Cases* (16 Wall., 97):

"The privileges and immunities designated are those which of right belong to citizens of all free governments. *Clearly, among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as affects all persons.*"

In the case of *Butchers' Union Co.* v. *Crescent City, etc., Co.* (111 U. S., 746), Justice Field, this time in a concurring opinion, again says:

"Among these inalienable rights, as proclaimed by that great document [the Declaration of Independence] is the right of men to pursue their happiness, by which is meant *the right to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties so as to give them the highest enjoyment.* The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. *The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.*

"It has been well said that '*the property which every man has is his own labor; as it is the original foundation*

of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper without injury to his neighbor is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the other from employing whom they think proper.' *Adam Smith's Wealth of Nations, Book 1, Chapter 10.*"

Justice Bradley (with whom concurred Justices Harlan and Woods) in his concurring opinion in the same case also says:

"I hold that the liberty of pursuit—*the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.* It was held by the majority of the court in the former decision of the *Slaughter House Cases* (16 Wall., 36, 57), that the 'privileges and immunities of citizens of the United States,' mentioned and referred to in the Fourteenth Amendment, are only those privileges and immunities which were created by the Constitution of the United States, and grew out of it, or out of laws passed in pursuance of it. I then held, and still hold, that the phrase has a broader meaning; that it includes those fundamental privileges and immunities which belong essentially to the citizens of any free government, among which Mr. Justice Washington enumerates the right of protection; the right to pursue and obtain happiness and safety."

In the case, *Ex parte Kuback* (85 Cal., 274), the exact question at issue in the case at bar was decided. The case of Kuback arose upon an application for a writ of *habeas corpus* by the petitioner, who had been tried and convicted under an ordinance of the City of Los Angeles, which, among other things, makes it a misdemeanor for any contractor to employ any person to work

more than eight hours a day. The court, in its opinion, said:

"It is claimed in support of the petition that this ordinance was unconstitutional and void. We think this objection is well taken. It is simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and *it is a direct infringement of the right of such persons to make and enforce their contracts.* If the services to be performed were unlawful or against public policy, or the employment were such as might be unfit for certain persons, for example, females or infants, the ordinance might be upheld as a sanitary or police regulation, but *we can not conceive of any theory upon which a city could be justified in making it a misdemeanor for any one of its citizens to contract with another for services to be rendered because the contract is that he shall work more than a limited number of hours per day.*"

In response to a resolution of the House of Representatives of the State of Colorado, requesting the Supreme Court of that State to give an opinion in writing for the guidance of the House upon the question whether a law providing that "eight hours shall constitute a day's work in all mines, factories, and smelters in this State" would be constitutional and legal, the court said (*In re Eight Hour Law*, 39 Pacific Rep. 328):

"*It is not competent for the legislature to single out the mining, manufacturing, and smelting industries of the State and impose upon them restrictions with reference to the hours of their employment, from which other employers of labor are exempt.* An act such as that proposed would be manifestly in violation of the constitutional inhibition against class legislation. *The bill submitted also violates the right of parties to make their own contracts—a right guaranteed by our bill of rights and protected by the Fourteenth Amendment of the Constitution of the United States.*"

Citing—

Low v. *Printing Co.*, 41 Neb.

The same court (*In re House Bill No. 203*, 39 Pacific Rep. 431) held that a proposed law of Colorado, in so far as it attempted to deprive persons of their right to fix by contract the manner of ascertaining compensation for mining coal, was in violation of the Fourteenth Amendment of the Constitution of the United States, the court using the same reasoning and citing the same authorities as in *Low* v. *Printing Co.* (*supra*), and *Frorer* v. *People* (141 Ill., 171), to which we shall come hereafter.

The opinion of the Supreme Court of Arkansas in the case of *Leep* v. *Railway Company* (58 Ark.) extends from page 407 to page 446 of said report, and is a very exhaustive review of this whole subject and of the authorities bearing upon the several constitutional questions involved. The case arose under an act prescribing, as a penalty for the withholding of an employé's wages by a railway company after his discharge, with or without cause, the continuance and payment, at the same rate, of such wages from the date of the dismissal until the wages so withheld were paid. This act was held to be unconstitutional and void. Among other things, on page 421, the court holds:

"When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, society, or government, and the parties are capable of contracting, *there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof.*"

The case of *State* v. *Goodwill* (33 W. Va., 179) is another which, by reason of the analogy of the questions there involved to those at issue in the case at bar, is deemed to be conclusive of the present case. There the defendant was convicted of a violation of a statute prohibiting persons engaged in mining and manufacturing from issuing for the payment of labor any order, or paper, except such as specified in the act. The court held this

law unconstitutional as being an abridgment of the privileges and immunities of the defendant, and also because it deprived him of his liberty and property without due process of law. In its opinion the court says:

"The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances, and *every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens and not of others, when there is no public necessity for such discrimination, is unconstitutional and void.*"

Citing *Wally* v. *Kennedy*, 2 Yerg., 554.

* * * * * * *

"The vocation of an employer, as well as of his employé, is his property. Depriving the owner of property of one of its attributes is depriving him of his property under the provisions of the Constitution. (*People* v. *Otis*, 90 N. Y., 48.) *The right to use, buy, and sell property and to contract in respect thereto, including contracts for labor—which is, as we have seen, property—is protected by the Constitution.* If the legislature, without any public necessity, has the power to prohibit or restrict the right of contract between private persons in respect of one lawful trade or business, then it may prevent the prosecution of *all* trades and regulate all contracts."

The case of *Godcharles & Company* v. *Wigeman* (113 Pa. St., 431) is also, in the respect which we are now considering, analogous to the case at bar. This was an action of *assumpsit* by Wigeman against Godcharles & Company to recover wages as a puddler in the company's nail mill. During the time of his employment, Wigeman had asked for and received from his employers certain orders on different parties for the purchase of coal and other articles, which orders were duly honored by the parties on whom they were drawn and afterwards paid by Godcharles & Company. Plaintiff maintained that under the act of 1881, forbidding their issuance on account of

salary, etc., these orders could not be applied as a set off on his claim for wages. As to this branch of the case the court held:

"The orders given by the defendants and received by the plaintiff constituted a proper set off. *The 1st, 2d, and 4th sections of the act of June 29, 1881, are utterly unconstitutional and void, inasmuch as by them an attempt is made by the legislature to do what in this country can not be done, that is, to prevent persons who are sui juris from making their own contracts. The act is an infringement alike of the right of the employer and the employé. More than this, it is an insulting attempt to put the laborer under a legislative tutelage which is not only degrading to his manhood but subversive of his right as a citizen of the United States.* He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron and coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void."

In the case of *Commonwealth* v. *Perry* (155 Mass. 117), which wes an indictment under a statute of Massachusetts forbidding employers to impose fines upon, or withhold any part of the wages of, an employé engaged in weaving for imperfections that might arise during the process of weaving, the court held said statute unconstitutional, in its opinion saying:

"There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American States, A statute which violates any of these rights is unconstitutional and void, even though the enactment of it is not expressly forbidden. Article 1 of the Declaration of Rights in the Constitution of Massachusetts enumerates among the natural, inalienable rights of men the right 'of acquiring, possessing, and protecting property.' Article 1, Sec. 10, of the Constitution of the United States provides, among other things, that no State shall pass any 'law impairing the obligation of contracts.' The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law.

"The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it. Indeed, the statute before us recognizes it as a legitimate business into which anybody may freely enter. The right to employ weavers, and to make proper contracts with them is therefore protected by our Constitution; and a statute which forbids the making of such contracts or attempts to nullify them, or impair the obligation of them, violates the fundamental principles of right which are expressly recognized in our Constitution. If the statute is held to permit a manufacturer to hire weavers and agree to pay them a certain price per yard for weaving cloth with proper skill and care, it renders the contract of no effect when it requires him, under a penalty, to pay the contract price if the employé does his work negligently and fails to perform his contract."

Citing—

Godcharles v. *Wigeman*, 113 Pa. St., 431;
State v. *Goodwill*, 33 W. Va., 179;
In re Jacobs, 98 N. Y., 98;
People v. *Marx*, 99 N. Y., 337;
People v. *Gilson*, 109 N. Y., 389; and
Millett v. *People*, 117 Ill., 294.

In the case of *Shaver* v. *Pennsylvania Co.* (71 Fed. Rep., 931, 936), the court held unconstitutional an act of Ohio, which provided, in substance, that no railroad company, insurance company, or other association, shall demand, require, or enter into any contract, agreement or stipulation with any person about to enter, or in the employ of, any railroad company whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company thereafter arising from personal injury or death, etc. Among other things, the court says:

"The act under consideration, while it is general in its nature, applies only to railroad companies and their employés, and is not, therefore, general in its application and does not operate uniformly upon all classes of citi-

zens. Under this statute railroad companies are prohibited from making contracts which other corporations are allowed to make. * * * The act under consideration is certainly one which impairs the right of a large number of citizens of Ohio to exercise a privilege that is dear to all persons, namely, that of making contracts concerning their own labor and the fruits thereof, and, so far as it relates to such contracts already made, impairs their validity. The act seems to assume that a large class of citizens, namely, those employed by railroad corporations, are incapable of making contracts for their own labor."

In the case of *Tiburcio Parrott* (1 Fed. Rep., 481) there came under review a clause in the Constitution of California prohibiting all corporations of that State from employing Chinese, and also an act of the legislature of the State, passed to give effect to said constitutional provision. The defendant, convicted under said statute, sued out a writ of *habeas corpus* in the Federal court, and both judges agreed in holding the law void as in conflict with the Constitution of the United States. It was claimed on behalf of the State, in justification of said statute, that the State had the right to impose any conditions it pleased on its own corporations. The court held:

"The right to labor is, of all others, after the right to live, the fundamental, inalienable right of man * * * of which he can not be deprived under the guise of law, or otherwise, except by usurpation or force."

Without further comment upon this branch of the case, we pass to our next proposition, which is—

III.

This statute is also violative of the provision of the Fourteenth Amendment that no State shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

It is not necessary here to enter upon any extended analysis of the provisions of the statute in question for the purpose of showing how *unequally* it affects, and how it discriminates against, all citizens of the State of Utah who are engaged in the business of mining, smelting, etc. This has already been done in what we have said under the head of police power. What we have already said is sufficient to show that, under the operation of the law, all other persons in the State, no matter in what business or occupation they may be engaged, are left entirely at liberty to make whatever contracts they please in respect of the character of the work to be performed, the amount to be paid therefor, and the number of hours that shall constitute a day's work in all occupations which by the law of the land are properly the subjects of contract.

The act in the case at bar, in sections 1 and 2, says that eight hours shall constitute a day's work *only* for those who are employed in underground mines or workings, smelters and other institutions for the reduction or refining of ores, and, in section 3, says that "any person, body corporate, agent, manager or employer who shall violate any of the provisions of sections 1 and 2 of this act shall be deemed guilty of a misdemeanor." This comparatively small class of people is in terms singled out by the legislature, made to bear this unjustifiable

and unequal burden, and deprived of liberties and rights of property that are enjoyed by every other citizen in the State who is engaged in any of the vast number of employments not enumerated in the act, and which by the law of the land they are protected in the enjoyment of and have the right in the courts to enforce.

This free and unrestricted right to engage in any calling that is permitted under the law, and to make necessary and lawful contracts with reference thereto, is one of the fundamental and inalienable rights of the citizen, without which, of course, no condition of social, commercial or financial prosperity could exist in a community or State that is in any way dependent on other communities or States for an interchange of commodities or commerce, and "must, therefore, be free in this country to all alike upon the same conditions. The right to pursue 'such callings' without let or hinderance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright, for 'the property which every man has is his own labor, and, as it is the original foundation of all other property, so it is the most sacred and inviolable.'" (*Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S., 746, the last clause of the above being quoted from Adam Smith's Wealth of Nations, Book 1, Chap. 10.)

It is no reply to this position to say, as was said by counsel for the State in the court below, that the right of contract of the plaintiff in error is not really abridged by this law because if as much work can not be accomplished by the same number of laborers in eight hours a day as in ten a greater number of men can be employed, or that two sets of workmen can be employed, the one to begin after the other has completed its allotted time.

Even if such a method would be as expedient (which, however, we do not admit), the statute is none the less vicious. The principle involved is the same. It still not only interferes with the right of the employer and employé to conduct their business in their own way and to make their own contracts, but, in substituting the will of the legislature in this respect for that of the parties to such contracts, it restricts the earnings of the employé to what he may be able to obtain from his employer for eight hours' work, and prevents him from earning the additional pay which he would be entitled to if he worked more than eight hours a day.

"Questions of power," says Chief Justice Marshall in the case of *Brown* v. *Maryland* (12 Wheat, 439), "do not depend on the *degree* to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition." So in the case at bar: if the legislature can prohibit the employment of laborers in mines and smelters for more than eight hours a day, it can prohibit such employment for more than one or any other number of hours; and it is no answer to this to say, as was said by counsel for the State in said case of *Brown* v. *Maryland*, that "*all* power may be abused, and that if the fear of its abuse is to constitute an argument against its existence, it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general safety." When we are inquiring whether an act such as the one at bar is within the prohibition of the Constitution, the question is not whether the State may so legislate as to accomplish what it may consider a beneficent result to a comparatively small class of laborers which it arbitrarily distinguishes and

separates from all others under the same general conditions, but whether the act is actually within the prohibition contained in the Constitution.

Again, in the case of *Boyd* v. *The United States* (116 U. S., 616, 635), opinion by Justice Bradley, this court held that the 5th section of the revenue act of 1874, authorizing a court of the United States to require the defendant, on motion of the district attorney, to produce in court his private books, invoices and papers, or else that the allegations of the district attorney should be taken as confessed, was unconstitutional and void as applied to suits for penalties, or to establish a forfeiture of the party's goods, it being repugnant to the Fourth and Fifth Amendments of the Constitution. On page 635 the court says:

"Though the proceeding in question is divested of many of the aggrivating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. * * * *It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.* We have no doubt that the legislative body is actuated by the same motives, but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which have become developed by time and the practical application of the objectionable law."

Neither can it be said, as was held by the court below, that the plaintiff in error was not deprived of any of his rights as a citizen without due process of law, because he was duly tried and convicted of his offense according to the act of the legislature and the usual mode of trial and procedure in such cases. It is not of the *form* or *manner*

of his trial and conviction that the plaintiff in error is complaining. He has made no objection to the regularity, under the law as it exists, of any of the steps taken in the matter of his arrest, trial, and commitment. It is of the fact that he was made liable to such prosecution by the act itself and because of its unconstitutionality that he prayed for a writ of *habeas corpus*.

The due process of law of which the plaintiff in error claims to have been denied is the arbitrary deprivation by the legislature, without trial or constitutional right, of those liberties and rights of property which were possessed by him before the passage of the act, and which are possessed by all other citizens of the State engaged in any other business or occupation and in the enjoyment of which they are protected in the courts by the law of the land.

The terms "due process of law" and "law of the land" are synonymous. (*Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How., 276; *Davidson* v. *New Orleans*, 96 U. S., 101.) "Everything that may pass under the form of an enactment of the legislature is not the law of the land. * * * Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void." (Mr. Webster's argument in the case of the *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat, 581–2). "By the law of the land is most clearly intended the *general* law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the *general rules which govern society*," (*id.*), and obviously he can not be deprived of these attributes of citizenship except in conformity with the provisions of a law which deprives all alike, under the same conditions, of the same rights, and applies generally to all citizens.

This is repeated in the case of *Millett* v. *People* (117 Ill., 292), to which we shall again refer, where the court says:

"The words 'due process of law' in this connection" (referring to the above quoted clause in the Constitution) "are held to be synonymous with the words 'the law of the land.' (Cooley on Const. Lim., 1st Ed., p. 352.) *And this means general public law, binding upon all the members of the community, under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals.* (*Jones* v. *Reynolds*, 2 Tex., 251; *Loggenheimer* v. *People*, 13 N. Y., 432; *Vanzandt* v. *Waddell*, 2 Yerger, 269.")

An examination of the authorities will show how universally the courts have held laws of this character to be subversive of these fundamental and inalienable rights of citizenship and to deprive the citizen of these rights without due process of law.

Take, for example, one of the leading cases upon this subject, to wit, that of *Jacobs* (98 N. Y., 98, 105, *et seq.*), to which we have already referred. It is cited with approval and extensively quoted from in nearly all of the cases that we have found in any way bearing upon this question; and we, therefore, take the liberty of inserting in this brief a rather full extract from the opinion of the court. In that case, the petitioner was arrested on a warrant, issued under an act of the Legislature of New York, entitled, "An act to improve the public health by prohibiting the manufacture of cigars and the preparation of tobacco in any form in tenement houses in certain cases." The court held what is stated (on page 115), as follows:

"When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the *public* health,

that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void."

Commencing at page 105 the court discusses several of the propositions advanced by the plaintiff in error in the case at bar, as follows:

"The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property can not be conceived, and hence any law which violates it or its value, *or takes away any of its essential attributes,* deprives the owner of his property.

"The constitutional guaranty would be of little worth if the legislature could, without compensation, destroy property or its value, deprive the owner of its use, or deny him the right to live in his own house, or to work at any lawful trade therein. If the legislature has the power under the Constitution to prohibit the prosecution of *one* lawful trade in a tenement house, then *it may prevent the prosecution of all trades therein.* Blackstone, in his classification of fundamental rights, says, 'the third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution *save only by the law of the land.*' (1 Com., 138.) In *Pumpelly* v. *Green Bay Co.* (13 Wall., 166, 177), Miller, J., says: 'There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution.' In *Wynehamer* v. *People* (13 N. Y., 378, 398), Comstock, J., says: 'When a law annihilates the value of property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision intended expressly

to shield personal rights from the exercise of arbitrary power.' In *People* v. *Otis* (90 N. Y., 48), Andrews, J., says: '*Depriving an owner of property of one of its attributes is depriving him of his property within the constitutional provision.*'

"So one may be deprived of his liberty and his constitutional rights thereto violated, without the actual imprisonment or restraint of his person. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. *All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements, are infringements upon the fundamental rights of liberty, which are under constitutional protection.*"

The same thing, in substance, is held in the case of *Bertholf* v. *O'Reilly* (74 N. Y., 509, 515).

In the case of *Low* v. *Rees Printing Company* (41 Neb., 127, 136, *et seq.*), another of these eight hour laws was under consideration. The law there in question provided, in substance, that not exceeding eight hours should constitute a day's work for all classes of mechanics, servants and laborers, excepting those engaged in farm or domestic labor, and that for working any employé over the prescribed time the employer should pay extra compensation in geometrical progression, etc. The part of said act limiting the hours of employment, etc., was held to be unconstitutional, on the ground that it deprived citizens of liberty and property without due process of law, and for the reason stated in the following extract. The court, in its opinion, says:

"The first section of the statute under consideration provided what number of hours should constitute a legal

day's work for all classes of laborers, *excepting* those engaged in farm or domestic labor. The argument made in favor of the necessity that each day the excess over eight hours should be devoted to rest, recreation and mental improvement, loses much of its force when these very desirable benefits are by the statute restricted to certain defined classes of laborers, no one of which, independently of the statute, devotes so many hours to labor as the classes denied the protection of the statute. Legislation of this kind is always fraught with danger; hence arose the prohibition of special legislation when avoidable, which is found in our Constitution.

* * * * * * *

"In *State* v. *Sheriff of Ramsey County* (51 N. W., Rep., 112), the Supreme Court of Minnesota filed an opinion in which was used this language: 'In *Nichols* v. *Walter* (37 Minn., 264), it was held that the law was general and uniform in its operation which operates equally upon all the subjects within the class for which the rule is adopted, but that *the legislature can not adopt an arbitrary classification, though it be made to operate equally upon each one within the class; and the classification must be based upon some reason suggested by such a difference in the situation and circumstances of the subjects placed in different classes as to disclose the necessity or priority of different legislation in respect to them.*' * * * '*Such law must embrace all and exclude none whose condition and wants render such legislation necessary or appropriate to them as a class.*' (*Randolph v. Wood, 49 N. J. Law, 88.*) '*No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar.*'

"There is perceived no reason why a resort to special legislation was necessary in respect of the subject-matter of the act with which we are now dealing."

In the case of *Ritchie* v. *People* (155 Ill., 98), the plaintiff in error was found guilty of a violation of the act of Pennsylvania of June 17, 1893, section 5 of which prohibits the employment of any female in any factory or workshop more than eight hours a day. In its opinion the court fully reviews many of the cases cited by us in

this brief, and reaffirms the doctrines upon which we contend that the statute in the case at bar is unconstitutional, after which the court says:

"Applying these principles to the consideration of section 5, we are led irresistably to the conclusion that it is an unconstitutional and void enactment. * * * Women employed by manufacturers are forbidden by section 5 to make contracts to labor longer than eight hours in a day, while women employed as saleswomen in stores, or as domestic servants, or as bookkeepers, or stenographers, or typewriters, or in laundries, or other occupations not embraced under the head of manufacturing, are at liberty to contract for as many hours of labor in a day as they choose. *The manner in which the section thus discriminates against one class of employers and employés and in favor of all others, places it in opposition to the guarantees hereinbefore discussed and renders it invalid.*

"But, aside from its partial and discriminating character, *this enactment is a purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time or faculties.* It substitutes the judgment of the legislature for the judgment of the employer and employé in a matter about which they are competent to agree with each other. It assumes to dictate to what extent the capacity to labor may be exercised by the employé, and takes away the right of private judgment as to the amount and duration of the labor to be put forth in a specified period. *When the legislature thus undertakes to impose an unreasonable and unnecessary burden upon any one citizen or class of citizens, it transcends the authority entrusted to it by the Constitution, even though it imposes the same burden upon all other citizens or classes of citizens.*"

The court then cites and quotes from the cases of *Kuback* (85 Cal., 274), *Low* v. *Printing Co.* (41 Neb., 127), *In re Jacobs* (98 N. Y., 98), and others, and, after saying that the act there in question is claimed to be an exercise of police power (p. 110), and that the court's attention has been called to the statement in the text books to the effect that the legislature may limit the hours of

employment of women in manufacturing establishments, says:

"These statements appear to be based entirely upon the decision of the Supreme Court of Massachusetts in *Commonwealth* v. *Hamilton Mfg. Co.*, 120 Mass., 385. There it was held that an act providing that no woman over the age of eighteen years should be employed by any person, firm or corporation in any manufacturing establishment more than ten hours in any one day was valid. * * * The reasoning of the opinion in the Massachusetts case cited does not seem to be sound. It assumes that there is no infringement of the employer's right to contract, because he may employ as many persons or as much labor as he chooses in some other occupation than that specified in the statute. This is begging the question. *The right to contract would be valueless if it could not be exercised with reference to the particular subject-matter in hand.* If its exercise is forbidden between two persons competent to contract and concerning a lawful subject of contract, it is none the less abridged because other persons may be permitted to contract, or because the same persons may be at liberty to contract about some other matter."

The court concludes its discussion of this branch of the case by quoting from the case of Jacobs what we have quoted from said case.

In the case of *Millett* v. *People* (117 Ill., 294, *supra*), the defendant was convicted, under section 1 of an act of Illinois providing for the weighing of coal at mines, etc., of failure to cause to be furnished and placed adjacent to his coal mine a scale upon which to weigh the coal hoisted therefrom. The practice, before the passage of said act, had been to pay the miners at the rate of so much per box for the coal mined. The act required payment upon the basis of the weight of said coal, and one of the sections provided that all contracts for the mining of coal in which such weighing should be dis-

pensed with should be null and void. In its opinion the court says:

"What is there in the condition or situation of the laborer in the mine to disqualify him from contracting in regard to the price of his labor, or in regard to the mode of ascertaining the price? And why should the owner of the mine, or the agent in control of the mine, not be allowed to contract in respect to matters as to which all other property owners and agents may contract?

"'Every one,' says Judge Cooley (Const. Lim., 1st ed., p. 391), 'has a right to demand that he be governed by *general* rules, and a special statute that singles his case out to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but an arbitrary mandate unrecognized in free government.' Mr. Locke has said of those who make the laws: '*They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor—for the favorite at court and the countryman at the plow. And this may justly be said to have become a maxim in the law, by which may be tested the authority and binding force of legislative enactments.*' And, again, the same authority says (p. 393): 'The doubt might also arise whether a regulation made for one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained. Distinctions in these respects should be based upon some reason which renders them important—like the want of capacity in infants and insane persons; *but if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have the capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the bounds of legislative power, even if it did not come in contact with express constitutional provisions.* The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of

happiness.' * * * '*The right of every individual must stand or fall by the same rule of law that governs every other member of the body politic or land under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void.*' (*Walley's Heirs* v. *Kennedy*, 2 Yerg., 554.")

The case of *Frorer* v. *People* (141 Ill., 171) was an action for debt under the act of Illinois of May 28, 1891, entitled "An act to provide for the payment of wages in lawful money," etc., the first section of which makes it unlawful for a person or corporation, while in the business of mining or manufacturing, to engage or be interested, directly or indirectly, in keeping or controlling any truck store, shop, or scheme for the furnishing of supplies, tools, clothing, provisions, or groceries to employés. The court held that "it was not competent for the legislature to select operators of mines or manufacturers, and provide that they shall bear burdens not imposed on owners of other property and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make."

The court says:

"The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C, and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract."

The case of *Ramsey* v. *People* (142 Ill., 380) was a criminal prosecution under an act requiring that owners and operators of coal mines, when the miner is paid on the basis of the amount of coal mined and delivered by him, to weigh the coal on pit cars before it is screened and to

pay on such weights. The court, upon the authority of *Frorer* v. *People* and *Milett* v. *People* (*supra*), held this statute to be unconstitutional.

In the case of *Braceville Coal Co.* v. *People* (147 Ill., 66) and *Ritchie* v. *People* (155 Ill., 98) the last-named cases were again affirmed and followed.

Again, in the case of *State* v. *Loomis* (115 Mo., 307), a statute making it a misdemeanor for any person, corporation or firm engaged in manufacturing or mining to pay its laborers by any check, memorandum, token or evidence of indebtedness not negotiable and redeemable at its face value in cash was held to be class legislation, and, as such, violative of the constitutional guaranty of due process of law, and void.

In *Austen* v. *Murray* (16 Pick., 121) an ordinance was considered which prohibited the bringing of bodies to town for interment without a license. It was obvious that the purpose of the ordinance was to prevent the interment of persons of a certain religious faith, and it was, therefore, held unconstitutional and void.

IV.

Conclusion.

From the above it will be seen that in Colorado, Nebraska, California, and Illinois, laws substantially similar to that in question in the case at bar have been held unconstitutional and void by the highest courts of those States, and that in Massachusetts, New York, Pennsylvania, Illinois, Ohio, Missouri, West Virginia, Maryland, Arkansas, Texas, Vermont, and many of the remaining States of the Union, laws so nearly analogous in principle to this statute that we deem them conclusive of the question, have likewise been so held.

Indeed, the three essential and indispensable elements of that perfectly free and unrestricted right of the citizen to contract with reference to all lawful pursuits in which he may desire to engage, which is guaranteed and protected by the Constitution of the United States, and to which we have above pointed, namely, the right of the employer and the employé to agree upon (1) the character of the services to be performed, (2) the amount to be paid for such service, and (3) the number of hours per day during which the service is to continue, are constantly grouped together in the authorities, and are manifestly so inseparably connected with each other that the destruction or abridgment of one is a destruction or abridgment of the whole of said right of contract; and, therefore, any decision holding that such destruction or abridgment of one of these elements is unconstitutional must necessarily apply to and control all questions as to the constitutionality of the others.

We have nowhere found a decision of any court upholding such a law as the one here involved, or any law analogous thereto, except in the cases we have enumerated, and which we contend are clearly distinguishable from the present case, namely, (*a*) cases where the law was enacted for the purpose of limiting the hours of employment of *public employés*, in which case this court has held that such a law is valid because merely in the nature of a direction from a principal to his agent (*b*) cases where such laws are enacted with regard to employments affected with a *public interest*, and (*c*) in the case of statutes which, although limiting the hours of employment, are enacted for the protection of the health or safety of women, children, insane persons, and the like, which last are generally, though not universally (155 Ill., 98), regarded as a valid exercise of the police power for the reasons we have already stated.

Relying, therefore, upon these authorities, and upon

the indication of the opinion of this court above quoted from the case of the *United States* v. *Martin* (94 U. S., 400), we respectfully submit that the judgment and order of the court below remanding plaintiff in error to the custody of the defendant, and denying his discharge from such custody, should be reversed.

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WASHINGTON, D. C.,
August 20, 1897.

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